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Low Ean Nee v Low Cheng Teik & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-909–07 OF 2020
LEE SWEE SENG, HADHARIAH SYED ISMAIL JJCA AND LIM CHONG FONG J
6 JANUARY 2023

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Companies and Corporations — Oppression — Allegation of — Appellant commenced action against first to third defendants alleging oppression — Appeal against High Court's dismissal of oppression action — Whether appellant made out case of oppression by first to third respondents — Companies Act 2016 s 346

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This was an appeal against the High Court's dismissal of the oppression action of the appellant made pursuant to s 346 of the Companies Act 2016. The appellant and the first to third respondents were the directors and shareholders of SNE Marketing Sdn Bhd ('the fourth respondent'), a multi-level direct marketing company supplying food supplements, nutritional supplements, and dietetic substances for medicinal use that bore the trademark SNE and its variants. Since the inception of the fourth respondent, the appellant did not participate in the fourth respondent which had been operated and managed by the first to third respondents. The appellant however had misgivings about the operation and management of the fourth respondent by the first to third respondents. According to the appellant: (a) 32 board of directors' resolutions of the fourth respondent were done using her forged signature; (b) there was a mismanagement and wrongful usage of the fourth respondent's funds ie the purchase of luxury vehicles; (c) there was an unsatisfactory book-keeping and tampering of the fourth respondent's financial accounts between 2007 until 2017; and (d) there was diversion of the fourth respondent's business to SNE Global Sdn Bhd ('SNE Global') by the first and third respondents as well as assignment of the fourth respondent's trademark at nominal consideration of RM10 to SNE Global by the first respondent. The appellant instituted this oppression action but was dismissed by the High Court and hence this appeal.

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Held, allowing the appeal:

(1) The appellant failed to discharge her burden of proof of forgery on the balance of probabilities. The appellant knew of the contents of the first set of the resolutions because she attended the board of directors meeting. That notwithstanding and more pertinently, the first set of resolutions must be deemed to have been circulated and received by the appellant because she failed to prove that her signature had been forged.

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Consequently, there was no actionable oppression for breach of articles 73 and 90 of the fourth respondent's articles of association (see paras 22 & 25).

(2) The purchase of luxury vehicles was not oppressive because these vehicles were bought and registered in the name and accounted as property, land and equipment of the fourth respondent. With the exception of the appellant, these vehicles were for the usage of the first to third respondents as active directors and the senior managers in the course of operating the multi-levelling marketing business. The usage of luxury vehicles by the directors and senior managers was an acceptable incentivisation besides also projecting the image of the fourth respondent in the multi-levelling marketing business. The appellant however chose to be a passive director and could not, therefore, complain that she had been oppressed (see para 26).

(3) The first to third respondents had satisfactorily accounted for the fourth respondent's turnover and profit. Moreover, the decline of the fourth respondent's turnover over the years had been caused by several factors not attributable to poor management. The booking of the value of the fourth respondent's land and building assets of RM3,602,668 in 2009 to 'NIL' in 2017 was properly explained by the respondents because of the imposition of the new Malaysian Private Equities Reporting accounting standards (see para 27).

(4) The first to third respondents caused and passed the fourth respondent's board of directors' resolution to grant the consent to SNE Global to use the trademark without a proper and reasonable explanation for it. In consequence, SNE Global sold the same products as that marketed by the fourth respondent. The actions of the first to third respondents were calculated to benefit them indirectly via other corporate entities controlled and/or related by them to the prejudice of the appellant being a substantial 50% shareholder of the fourth respondent. The assignment of the trademark at the consideration of RM10 was unquestionably dubious. This smacked of non-compliance of norms of fair dealing and violation of conditions of fair play and hence oppressive. The learned High Court judge had committed a misdirection by finding there was no oppression on the appellant by the first to third respondents. The majority of the directors failed to act in the best interest of the appellant vis-à-vis the fourth respondent. The appellant had successfully made out the case of oppression against her by the first to third respondents (see paras 31, 35 & 38).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak tindakan penindasan perayu yang dibuat menurut s 346 Akta Syarikat 2016.

Perayu dan responden pertama hingga ketiga adalah pengarah dan pemegang saham SNE Marketing Sdn Bhd ('responden keempat'), sebuah syarikat pemasaran langsung pelbagai aras yang membekalkan makanan tambahan, tambahan pemakanan dan bahan dietetik untuk kegunaan perubatan yang mempunyai tanda dagangan SNE dan variannya. Sejak penubuhan responden keempat, perayu tidak menyertai responden keempat yang telah dikendalikan dan diuruskan oleh responden pertama hingga ketiga. Perayu bagaimanapun meragui mengenai operasi dan pengurusan responden keempat oleh responden pertama hingga ketiga. Menurut perayu: (a) 32 resolusi lembaga pengarah responden keempat telah dilakukan menggunakan tandatangan palsunya; (b) terdapat salah urus dan salah guna dana responden keempat iaitu pembelian kenderaan mewah; (c) terdapat simpan kira yang tidak memuaskan dan gangguan terhadap akaun kewangan responden keempat antara tahun 2007 hingga 2017; dan (d) terdapat pengubahan perniagaan responden keempat kepada SNE Global Sdn Bhd ('SNE Global') oleh responden pertama dan ketiga serta penyerahan tanda dagang responden keempat pada pertimbangan nominal RM10 kepada SNE Global oleh responden pertama. Perayu telah memulakan tindakan penindasan ini tetapi telah ditolak oleh Mahkamah Tinggi dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Perayu gagal melepaskan beban pembuktian pemalsuannya atas imbangan kebarangkalian. Perayu mengetahui kandungan set pertama resolusi itu kerana dia menghadiri mesyuarat lembaga pengarah. Walau apa pun dan lebih penting lagi, set resolusi pertama mesti dianggap telah diedarkan dan diterima oleh perayu kerana dia gagal membuktikan bahawa tandatangannya telah dipalsukan. Akibatnya, tiada penindasan yang boleh diambil tindakan kerana melanggar artikel 73 dan 90 artikel persatuan responden keempat (lihat perenggan 22 & 25).

(2) Pembelian kenderaan mewah adalah tidak menindas kerana kenderaan ini dibeli dan didaftarkan atas nama dan dikira sebagai harta, tanah dan peralatan responden keempat. Kecuali perayu, kenderaan ini adalah untuk kegunaan responden pertama hingga ketiga sebagai pengarah aktif dan pengurus kanan semasa menjalankan perniagaan pemasaran pelbagai aras. Penggunaan kenderaan mewah oleh pengarah dan pengurus kanan merupakan insentif yang boleh diterima selain turut menonjolkan imej responden keempat dalam perniagaan pemasaran pelbagai aras. Perayu bagaimanapun memilih untuk menjadi pengarah yang pasif dan oleh itu tidak boleh mengadu bahawa dia telah ditindas (lihat perenggan 26).

(3) Responden pertama hingga ketiga telah mengambil kira perolehan dan keuntungan responden keempat dengan memuaskan. Selain itu, kemerosotan perolehan responden keempat selama ini disebabkan oleh beberapa faktor yang tidak berpunca daripada pengurusan yang lemah.

Tempahan nilai aset tanah dan bangunan responden keempat sebanyak RM3,602,668 pada 2009 kepada 'TIADA' pada 2017 dijelaskan dengan betul oleh responden kerana pengenaan piawaian perakaunan Pelaporan Ekuiti Persendirian Malaysia yang baharu (lihat perenggan 27).

(4) Responden pertama hingga ketiga menyebabkan dan meluluskan resolusi lembaga pengarah responden keempat untuk memberikan kebenaran kepada SNE Global untuk menggunakan tanda dagang tanpa penjelasan yang wajar dan munasabah untuknya. Akibatnya, SNE Global menjual produk yang sama seperti yang dipasarkan oleh responden keempat. Tindakan responden pertama hingga ketiga dikira memberi manfaat kepada mereka secara tidak langsung melalui entiti korporat lain yang dikawal dan/atau dikaitkan oleh mereka dengan memprejudiskan perayu sebagai pemegang saham besar 50% daripada responden keempat. Penyerahan tanda dagang itu dengan pertimbangan RM10 sudah pasti meragukan. Ini benar-benar merupakan ketidakpatuhan norma-norma urus niaga yang adil dan pelanggaran syarat-syarat keadilan dan oleh itu menindas. Hakim Mahkamah Tinggi yang bijaksana telah melakukan salah arah dengan mendapati tiada penindasan terhadap perayu oleh responden pertama hingga ketiga. Majoriti pengarah gagal untuk bertindak demi kepentingan terbaik perayu vis-à-vis responden keempat. Perayu telah berjaya membuktikan kes penindasan terhadapnya oleh responden pertama hingga ketiga (lihat perenggan 31, 35 & 38).]

Cases referred to

Chan Choon Ming v Low Poh Choon & Ors [1994] MLJU 351; [1995] 1 CLJ 812, HC (refd)

Chi Liung & Son Ltd, Re; Tong Chong Fah v Tong Lee Hwa & Ors [1968] 1 MLJ 97 (refd)

Chew Sang Hai v Intan Kinabalu Sdn Bhd & Ors [2012] 3 MLJ 244, FC (folld)

Coliseum Stand Car Service Ltd Abdul Khalik v Mohamed Jee & Ors, Re [1972] 1 MLJ 109 (distd)

Doretti Resources Sdn Bhd v Fitters Marketing Sdn Bhd & Ors [2017] MLJU 836; [2017] 1 LNS 738, HC (refd)

GS Yuasa Corp v GBI Marketing Malaysia Sdn Bhd [2017] 8 MLJ 166, HC (refd)

Izzap Limited v Sanmaru Overseas Marketing Sdn Bhd & Anor [2010] MLJU 1176; [2011] 2 CLJ 220, HC (refd)

Karen Thomas v Santhi a/p Shanmugam and Anor [2010] MLJU 1311; [2010] 1 LNS 1282, HC (refd)

Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor [2010] MLJU 269; [2010] 6 CLJ 721, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 181
Companies Act 2016 s 346

Appeal from: Originating Summons No WA-24NCC-536–10 of 2019 (High Court, Kuala Lumpur)

Conrad Young Wye King (with Alfred Lai Choong Wui) (Alfred Lai & Partners) for the appellant.
Arjan a/l Pursumal (with M Gulabraj) (Vasdev Bakshani & Assoc) for the respondents.

Lim Chong Fong J:

INTRODUCTION

[1] This is an appeal against the High Court's dismissal of the oppression action of the appellant made pursuant to s 346 of the Companies Act 2016.

[2] At the conclusion of the appeal on 13 September 2022, the appeal was unanimously allowed by us with the following orders made:

(a) the order of the High Court dated 13 July 2020 is set aside;

(b) the first respondent or the second respondent or the third respondent shall purchase all of the appellant's shares in the fourth respondent;

(c) an independent auditor shall be agreed upon and appointed by the appellant and the first respondent or the appellant and the second respondent or the appellant and the third respondent within two weeks from the date of this order to value and fix the price of the appellant's shares in the fourth respondent;

(d) in the event the appellant and the first respondent or the appellant and the second respondent or the appellant and the third respondent are unable to agree to the appointment of an independent auditor, this honourable court would appoint PwC and if conflicted out, EY and if conflicted out, then KPMG to value the shares of the fourth respondent as at the date of the originating summons 14 October 2019 based on international standards of accounting and valuation concerning a similar business as a going concern ('Expert Valuer Valuation Report');

(e) the Expert Valuer Valuation Report shall be binding on the parties as expert valuation;

(f) the payment of the purchase price as determined by the expert valuer shall be made by the first, second, and third respondents who are also shareholders in the fourth respondent in the proportion of their

shareholding in the fourth respondent within six calendar months from the date of receipt of the Expert Valuer Valuation Report;

(g) parties are at liberty to apply; and

(h) the respondents shall pay costs of RM35,000 (here and below) to the appellant subject to allocator fees.

BRIEF BACKGROUND

[3] The fourth respondent, SNE Marketing Sdn Bhd which is the subject company has the following shareholders in the following proportions:

(a)	Low Ean Nee ('appellant')	50.0%
(b)	Low Cheng Teik ('first respondent')	39.7%
(c)	Low Hock Boon ('second respondent')	10.0%
(d)	Lau See Yoong ('third respondent')	00.3%

[4] All the above shareholders are directors of the fourth respondent with the first respondent also doubling up as chairman of the company.

[5] The appellant is related to the first and second respondents by family ties in that the appellant is the niece of the first respondent and the second respondent is the son of the first respondent. Hence, the appellant and the second respondent are cousins.

[6] The fourth respondent is a multi-level direct marketing company supplying food supplements, nutritional supplements, and dietetic substances for medicinal use that bear the trademark SNE and its variants thereof.

[7] The fourth respondent is the registered proprietor of the SNE trademarks No 2013002164 in Class 5 and No 2013002165 in Class 35 ('trademark') respectively.

[8] In 2003, the appellant became a shareholder in the fourth respondent when the first respondent allocated 200,000 shares to the appellant's family. The appellant's father who is the brother of the first respondent paid RM200,000 for the shares at the nominal par value of RM1 per share and requested that the shareholding be registered in the appellant's name.

[9] Since the inception of the fourth respondent, the appellant did not participate in the fourth respondent which has been operated and managed by the first to third respondents.

[10] Between 2003 to 2018, the total turnover and dividend pay-out of the fourth respondent was RM1,023,097,850.87 and RM15,010,000 respectively.

[11] The appellant however around 2018 has misgivings about the operation and management of the fourth respondent by the first and third respondents. According to her, 32 board of director's resolutions of the fourth respondent were done using her forged signature since 2008 including for the purchase of numerous luxury vehicles such as Porsche Cayman and 911, Mercedes Benz E280 and C300 Coupe, Audi Q7, etc for the benefit of the first, second and third respondents as well as the usage of the trademark by SNE Global Sdn Bhd, SNE High Tech Plantation Sdn Bhd, and SNE Plantation Sdn Bhd. These board of directors' resolutions were never given to the appellant. Subsequently, the trademark was assigned at a nominal consideration of RM10 to SNE Global Sdn Bhd which has been established also as a multi-level direct marketing company in 2016. SNE Global Sdn Bhd is 50% controlled by Low Poh Ling who is the first respondent's daughter and second respondent's sister respectively. Furthermore, the first to third respondents permitted the products of SNE Global Sdn Bhd to be wholly imported by Diversified Team Sdn Bhd.

[12] Consequently, the appellant on 12 March 2019 lodged a police report against the first respondent in respect of the assignment of the trademark.

[13] The appellant also on 14 October 2019 instituted this oppression action because her rights in the fourth respondent have been unfairly disregarded by the first to third respondents.

IN THE HIGH COURT

[14] The disposal of the oppression action in the High Court was undertaken entirely *vide* affidavit evidence.

[15] The appellant advanced broadly nine grounds of complaints and contentions in the High Court in justification of the oppressive conduct of the first to third respondents against her as a shareholder of the fourth respondent, viz:

(a) failure of the first to third respondents to conduct the affairs of the fourth respondent following its articles of association, particularly committing forgery of the appellant's signature;

(b) failure to secure a reasonable price for the disposal of the trademark by the fourth respondent that was done by way of a deed of assignment executed by the first respondent without the authority or sanction of the fourth respondent's board of directors' resolution;

(c) disposed of the fourth respondent's Product Registration No MAL200034169TCR to Diversified Team Sdn Bhd;

(d) the first to third respondents set up a competing business;

(e) the fourth respondent's funds were improperly used;

(f) the first to third respondents' mismanaged the fourth respondent;

(g) the fourth respondent's accounts were tampered and/or inaccurate;

(h) the fourth respondent's assets were not satisfactorily accounted; and

(i) stifled suit against directors of the fourth respondent.

[16] As the result, the appellant sought for an order that the first to third respondents buy out her shares at RM27.02 per share as valued by Messrs RW William appointed by the appellant.

[17] The learned High Court judge accepted the respondents' rebuttals in defence and accordingly rejected all the appellant's complaints and contentions. The oppression action was hence dismissed with costs of RM15,000.

FINDINGS OF THIS COURT

[18] This oppression action is made pursuant to s 346 of the Companies Act 2016 (formerly s 181 of the Companies Act 1965) which provides:

Section 346 Remedy in cases of an oppression

(1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or disregard of his or their interests as members, shareholders, or debenture holders of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders, or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

(2) if on the such application the Court is of the opinion that either of those grounds is established, the Court may make such order as the Court thinks fit with the view to bringing to an end or remedying the matters complained of, and without prejudice to the generality of subsection (1), the order may —

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(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in the future;

(c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;

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(d) in the case of a purchase of shares by the company, provide for a reduction accordingly of the capital of the company; or

(e) provide that the company be wound up.

C

(3) If an order that the company is wound up is made under paragraph (2)(e), the provisions of this Act relating to the winding up of a company shall apply as if the order had been made upon a petition duly presented to the Court by the company, with such adaptations as are necessary.

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(4) If an order under this section makes any alteration in or addition to any constitution, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the constitution inconsistent with the order, but subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

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(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days from the making of the order.

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(6) The applicant who contravenes subsection (5) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, in the case of a continuing offence, to a further fine of five hundred ringgit for each day during which the offence continues after conviction. The offence continues after conviction.

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[19] The law on corporate oppression of shareholder member(s) is lucidly encapsulated in *Corporate Powers Accountability* (3rd Ed, 2018) by Loh Siew Cheang as follows:

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> 9–174 A petitioner need not show that he has been singled out as a victim of 'unfair dealing' or unfair prejudice in order to succeed under s 346 of the Act. The rationale is that the focus on s 346 is upon the effect of conduct as it affects members and not the intention or motive of the wrongdoer. The corollary principle is that if all shareholders are equally treated or affected, it does not mean that the statutory remedy is unavailable. The rationale is the same as in the former case — the section is not concerned with the consequences to the interests of the wrongdoers but the consequences to the interests of the complainant: *Re Sam Weller & Sons Ltd*.
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> ...
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> 9–176 In Malaysia, the relevant words in s 346 are 'one or more of the members'.

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One would probably be indulging in semantics to say that by virtue of the words, across the board is not within the section.

Section 346 is given a purposive construction and the provision is concerned with the consequences or effects of conduct upon the complainant and the oppressors: *Re Sam Weller & Sons Ltd*. In the Singapore case of *In the Matter of Kian Ann Realty Ltd*, Kan Ting Chiu JC said:

> It follows ... that oppression is to be determine objectively, and this is not to be viewed solely from the standpoint of a disgruntled member, and that it does not mean that each member must be treated exactly like the other. Corporate decisions are to be made by taking into account the legitimate interest of all members and where they are at odds, to balance them. After weighing the diverse interest, action is taken in good faith which is less favourable to one member than the others, that is not oppression. Conversely, it may be oppression to treat all members in the same way without regard for their different interests ...

[20] In *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor* [2010] MLJU 269; [2010] 6 CLJ 721, Richard Malanjum CJSS (later CJ) held as follows:

> [25] Therefore, in order to succeed in its petition pursuant to s 181 the petitioner has to establish and 'must eminently be determined according to the facts' of this case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interests, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.
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> [26] In other words s 181 permits judicial remedy on four categories of conduct, namely, oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.
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> [27] It may also be noted that from the wordings of s 181 its basic theme is 'unfairness'. However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. 'The court ... has a very wide discretion, but it does no sit under a palm tree' (see: *O'Neil v Philips* [1999] 2 All ER 961).

[21] We have accordingly in the exercise of our appellate function reviewed the grounds of judgment of the learned High Court judge in respect of the complaints and contentions now put forth by the appellant in the appeal premised upon her memorandum of appeal and submissions in court.

[22] Thus, concerning the issue of contravention of articles 73 and 90 of the fourth respondent's articles of association particularly on the forgery of the appellant's signature in the board of directors' resolutions classified as first set of resolutions that were made between 31 January 2008 and 12 October 2018, we

A are satisfied with the findings of the learned High Court judge that the appellant failed to discharge her burden of proof of forgery on the balance of probabilities. This is a finding of fact which ought not to be interfered on appeal.

B **[23]** Furthermore, we noted the appellant complained that the respondents did not circulate the first Set of Resolutions to the appellant. As to the resultant effect, it was held by V C George J (later JCA) in *Chan Choon Ming v Low Poh Choon & Ors* [1994] MLJU 351; [1995] 1 CLJ 812 as follows:

C > Article 90 which is one of the articles under the general heading 'Proceedings of Directors', has to be read in the context of the principle that the powers conferred upon directors are conferred on them collectively as a board. In that context, it is inconceivable that notice of an intended resolution of the directors need not be given to every member of the board. If upon the majority signing such a resolution it is not necessary to pass it on to the others who are present in the country there could be a situation of a company being managed, not by the board, but by a clique, no doubt consisting of the majority of the board, using article 90 type of resolutions and leaving the minority completely in the dark as to what is happening in and to the company. It cannot then be said that the business of the company is managed by the directors (as provided by article 73).
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> In *Pulbrook v Richmond Consolidated Mining company* [1878] 9 Ch D 610, 612, what Jessel MR, said, in dealing with the case of a director who was improperly and without cause excluded from meetings of the board, is I think applicable to a director kept in the dark in respect of an article 90 resolution. He said:
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> > He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings.
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> > It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.
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> *In my judgment to make article 73 meaningful and to give effect to the collective responsibility of the board, although all that is required for an effective Art 90 resolution is that it be signed by the majority, it must be taken as implied that every member of the board has to have the resolution circulated to him or her before it can be accepted as a directors' resolution. Which is why in board room parlance, an article 90 type of resolution is usually referred to as a circular resolution. Each of the said resolutions, notice of which was not given to the plaintiff, is, in my judgment, ineffective*. (Emphasis added.)

[24] It was also held by Gill J in *Re Chi Liung & Son Ltd; Tong Chong Fah v Tong Lee Hwa & Ors* [1968] 1 MLJ 97 as follows:

It was contended on behalf of the respondents that, if the company is carrying on business ultra vires its articles of association, the petitioner must bring an action. In my judgment, action is not necessary in view of the remedy available under s 181(1) of the Companies Act. *If the company is doing something which is ultra vires its powers, then there is oppression because it deprives the minority of shareholders of their rights as members of the company to have its affairs conducted in accordance with its articles of association* (see *Re HR Harmer Ltd* [1958] 3 All ER 689; [1959] 1 WLR 62) ... (Emphasis added.)

[25] Although we are mindful of the law as set out in *Chan Choon Ming* as well as *Re Chi Liung & Son Ltd*, we are however constrained to conclude that the appellant knew of the contents of the first set of the resolutions because she attended the board of directors meeting as found by the learned High Court judge. That notwithstanding and more pertinently, we find that the first set of resolutions must be deem to have been circulated and received by the appellant because she failed to prove that her signature thereon has been forged. Consequently, there is no actionable oppression for breach of articles 73 and 90 of the fourth respondent's articles of association.

[26] Next in respect of the issue of mismanagement and wrongful usage of the fourth respondent's funds, we are satisfied with the findings of the learned High Court judge that the purchase of luxury vehicles was not oppressive because these vehicles were bought, registered in the name and accounted as property, land, and equipment by the fourth respondent. With exception of the appellant, these vehicles are for the usage of the first to third respondents as active directors and the senior managers in the course of operating the multi-levelling marketing business. We find that the usage of luxury vehicles by the directors and senior managers is an acceptable incentivisation besides also projecting the image of the fourth respondent in the multi levelling marketing business. The appellant however chose to be a passive director and cannot, therefore, complain that she has been oppressed in this circumstance. The case of *Re Coliseum Stand Car Service Ltd Abdul Khalik v Mohamed Jee & Ors* [1972] 1 MLJ 109 relied upon the appellant where company funds were used for loans unconnected with the company affairs is distinguishable in our view.

[27] As to the issue of unsatisfactory book-keeping as well as the tampering of the fourth respondent's financial accounts between 2007–2017, we are also satisfied with the findings of the learned High Court judge that the first to third respondents have satisfactorily accounted for the fourth respondent's turnover and profit. Moreover, we find that the decline of the fourth respondent's turnover over the years has been caused by several factors not attributable to poor management. The booking of the value of the fourth respondent's land and building assets of RM3,602,668 in 2009 to 'NIL' in 2017 is properly explained by the respondents because of the imposition of the new Malaysian Private Equities Reporting accounting standards.

[28] Finally, in respect of the issue of the connected appellant's complaints on the diversion of the fourth respondent's business to SNE Global Sdn Bhd by the first and third respondents as well as assignment of the fourth respondent's trademark at nominal consideration to SNE Global Sdn Bhd by the first respondent, we noted that the learned High Court judge did not find any oppression committed on the appellant.

[29] In *Karen Thomas v Santhi a/p Shanmugam and Anor* [2010] MLJU 1311; [2010] 1 LNS 1282, Mohamad Ariff Md Yusof J (later JCA) held as follows:

> As expressly pleaded in the petition, the parties were engaged in 'a 50–50 partnership'. Thus it is immediately recognised that the principles stated in the leading case of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 apply to the facts of this case. Ebrahimi has been consistently applied by the Malaysian Courts, almost to the extent of being the starting point for any consideration of a s 181 petition. The Supreme Court in *Tien Ik Enterprises v Woodsville Sdn Bhd* [1995] 1 MLJ 769; [1995] 1 LNS 99 apply to the facts of this case. The Supreme Court in *Tien Ik Enterprises v Woodsville Sdn Bhd* [1995] 1 MLJ 769; [1995] 1 LNS 99 interpreted the Ebrahimi principles as meaning simply the importation of equitable principles to govern the relationship amongst shareholders, which principles should be broadly read. See also *Owen Sim Lian Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113; [1996] 4 CLJ 716, *Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227; [1978] 1 LNS 170 and *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd* [1996] 1 MLJ 661; [1996] 1 CLJ 393. In *Kong Thai Sawmill* it was held:
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> > ... for the case to be brought within s 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon the power, make policy or executive decisions, with which the complainant does not agree, is not enough. *Those who take interest in companies limited by shares have accepted majority rule. It is only when majority rule passes over into a rule oppressive of the minority, or in disregard of their interests, that section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made ...* (Emphasis added.)

[30] Moreover in *Izzap Limited v Sanmaru Overseas Marketing Sdn Bhd & Anor* [2010] MLJU 1176; [2011] 2 CLJ 220, Abdul Aziz Abdul Rahim J (later JCA) held as follows:

> [13] Section 181 may be invoked where there is 'oppression' of a member or where a member's interest disregarded. It may also be invoked where there is a resolution or act that 'unfairly discriminates' against or is 'otherwise prejudicial' to a member.
>
> [14] *A shareholder has a right to expect that the affairs of the company are conducted based on standards of fair dealings and under conditions of fair play. If there is departure from these standards and conditions then the conduct or the act complaint of could be*

oppressive. There are cases which have applied this principle that is for an allegation of oppressive conduct to be sustained 'at the very least, there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every member is entitled to rely: *Elder v Elder & Watson Ltd* [1952] SC 49 and *Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227; [1978] 1 LNS 170.

[15] *It has also been held in one case, Re A Company (No 005134 of 1968), ex p Harris* [1989] BCLC 383 *at pp 389–390, that the test of unfair prejudice is objective and if the objective bystander observes that the conduct of the respondent was for improper purpose or with improper motive, that may well be a relevant consideration in determining whether the conduct is unfairly prejudicial*.

[16] Applying the above principles to the facts of the case, *I am of the opinion that the conduct of the second defendant in setting up a competing business in the form of company or companies manufacturing and distributing noodle labelled as 'Ibumie' under the auspices of Ibufood Corporation in direct competition with similar business of 'Indomie' of first defendant of which the plaintiff is the shareholder*, and later on engineered the takeover of the entire equity of Ibufood Corporation by OCB Bhd *is prejudicial to the interest of the plaintiff and the first defendant*. Furthermore, the refusal or reluctance on the part of the second defendant to allow the plaintiff to inspect the accounts and books and records of the first defendant is visible departure from the standards of fair play and fair dealings. (Emphasis added.)

[31] On the facts and circumstances here, we find that the first to third respondents on second February 2016 caused and passed the fourth respondent's board of directors' resolution to grant the consent to SNE Global Sdn Bhd to use the trademark without a proper and reasonable explanation for it. In consequence, SNE Global Sdn Bhd sold the same products as that marketed by the fourth respondent in 2017. This was followed by the first respondent and his daughter Low Poh Ling executing a deed of assignment on 28 May 2018 to assign the trademark from the fourth respondent to SNE Global Sdn Bhd at the mere consideration of RM10. The second and third respondents were passive about it. Moreover, the first to third respondents had since on fourth April 2012 and again on 12 October 2018 caused and passed the fourth respondent's board of directors' resolution to grant the consent to SNE High Tech Plantation Sdn Bhd and SNE F&B Sdn Bhd to use the trademark respectively without proper and reasonable explanation for it too.

[32] We are aware that in *Doretti Resources Sdn Bhd v Fitters Marketing Sdn Bhd & Ors* [2017] MLJU 836; [2017] 1 LNS 738, Wong Kian Kheong JC (now J) held as follows:

[46] The above finding that the three assignments are null and void, is further supported by the following evidence and reasons:

...

(2) the second Assignment is dubious for the following reasons —

(a) it is inconceivable for a valuable trade mark to be assigned for a mere RM10;

...

[33] Also in *GS Yuasa Corp v GBI Marketing Malaysia Sdn Bhd* [2017] 8 MLJ 166, Wong Kian Kheong JC (now J) also held as follows:

> [35] In any event, this court finds that the assignment is a sham for the following reasons:
>
> (a) if the two trademarks were genuine and had valuable goodwill, it did not make commercial sense for OBI to assign absolutely the two trademarks to the defendant for a mere RM10;
>
> (b) ...

[34] The trademark is not in dispute a valuable asset of the fourth respondent which has enabled the sale of the fourth respondent's products to generate substantial turnover over the years. We therefore agree and adopt the following proposition of Abdul Rahman Sebli J (now FCJ) in *Chew Sang Hai v Intan Kinabalu Sdn Bhd & Ors* [2012] 3 MLJ 244:

> [39] The fourth respondent, being a former registered valuer himself admitted that he was aware that very little and outdated comparables are shown in the JS Valuers report. He went on to agree that such outdated comparables would render a valuation inaccurate. The fourth respondent's admission shows that the respondents knew or had reason to believe that the price of the three blocks of shoplot as determined by JS Valuers was an undervalue. That naturally raises the question as to why they agreed to sell the phase three shoplots to CLDSB at an undervalue. The inescapable inference that can be drawn is that the price of RM13m had been predetermined by the respondents and that JS Valuers were instructed to prepare a valuation based on the predetermined figure. *This in my view is an act of oppression and in disregard of the petitioner's interest, bearing in mind any disposal of the first respondent company's assets at an undervalue would affect the dividends of the shareholders, as admitted by the fourth respondent himself* ... (Emphasis added.)

[35] In the premises, we find that the actions of the first to third respondents were calculated to benefit them indirectly via other corporate entities controlled and/or related by them to the prejudice of the appellant being a substantial 50% shareholder of the fourth respondent. The assignment of the trademark at the consideration of RM10 is unquestionably dubious here. This smacks of non-compliance of norms of fair dealing and violation of conditions of fair play and hence oppressive. Consequently, we find the learned High Court judge has committed a misdirection by finding there was no oppression on the appellant by the first to third respondents. In other words, there was failure to appreciate that majority of the directors failed to act in the best

interest of the appellant vis a vis fourth respondent. The affairs of the company were conducted effectively to sideline and exclude the appellant is interest as shareholder and director.

[36] We are nonetheless mindful that, subsequent to the assignment of the trademark, the second and third respondents claimed no knowledge of the assignment which was unilaterally made by the first respondent. According to the first respondent, the assignment of the trademark was procured through undue influence on him by his daughter, Sham Kwee Lian, and Yu Baoguo who are his assistant and old friend respectively. Subsequently, the fourth respondent took steps to regularise the action of the first respondent in having assigned the trademark via Kuala Lumpur High Court Commercial Suit No WA-22IP-4–01 of 2020 to recover the Trademark from SNE Global Sdn Bhd ('recovery action').

[37] However, we find that the explanation of the first to third respondents is an incredulous pretence. The motivation behind the institution of the recovery action is, in our view, to bolster the respondents' defence of the appellant's oppressive action that has already been instituted in 2019.

[38] As the result of our findings in para [37] above, we, therefore, find that the appellant has successfully made out her case of oppression against her by the first to third respondents that warrants appellate intervention. It is sufficient for the appellant to justify her case by having only established a singular complaint amongst a host of other complaints advanced by her. The critical factor that counts is the materiality and efficacy of the complaint. Additionally, we do not find that the appellant inordinately delayed in instituting the oppression action in 2019 because she must have only acquired the knowledge of the assignment of the trademark after mid-2018. In our view, the wrongful assignment of the trademark is understandably the reasonable 'straw that broke the camel's back' for the appellant to sue the respondents despite her growing and accumulating misgivings against them over the years.

CONCLUSION

[39] It is for the foregoing reason that we allowed the appeal as so ordered including on the valuation of the shares by a third party since it was not dealt with by the High Court below.

A *Appeal allowed.*

Reported by Nabilah Syahida Abdullah Salleh

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